Victor Buyck Steel Construction Sdn Bhd v PI Corrosion Engineering Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D-3-24-234 OF 1997

ARIFIN JAKA J

30 APRIL 1998

Civil Procedure *— Injunction — Injunction to restraint defendant from filing winding up petition against plaintiff — Whether debt disputed bona fidei — Whether abuse of process of court to file petition to wind up plaintiff based on disputed debt — Whether application should be granted*

The plaintiff engaged the defendant as its subcontractor. The defendant claimed that it had performed its obligations under the contract and therefore was entitled to payment of the sum stated in the invoices. As the plaintiff had failed to meet the payment due, the defendant caused to be issued a notice of demand under s 218 of the Companies Act 1965 against the plaintiff. The plaintiff filed an application seeking for an injunction to restraint the defendant from filing a winding up petition against the plaintiff on the ground that the debt claimed by the defendant was disputed and it was an abuse of process of court to file a petition to wind up the plaintiff based on a disputed debt. It was argued that the debt was disputed on the grounds that the defendant was not entitled to further payment as the plaintiff had a claim against the defendant for breach of contract which the defendant was liable to indemnify and the amount payable far exceeds the amount payable to the defendant. The issue before the court was whether the debt was bona fide disputed.

Held, dismissing the application:

(1) The debt claimed by the defendant was based on the invoices issued and sent to the plaintiff and the plaintiff did not raise any objection or dispute the invoices issued. Instead, the plaintiff had requested the defendant to remit the difference between the amount withheld and the amount invoiced by the defendant. This tantamount to an admission of the debt. Therefore, the dispute of the debt by the plaintiff was not bona fide (see p 517C, E–F).

(2) The counterclaim advanced by the plaintiff did not mean that the defendant, who was the petitioner, was bound to fail in its petition to wind up the plaintiff. The court will decide at the hearing of the petition whether to exercise its discretion in favour of the defendant. It follows therefore that there was no justification for the court to grant the injunction as the debt was not genuinely disputed (see p 518F–G).

[**Bahasa Malaysia summary**

Plaintif mengambil defendan sebagai sub-kontraktor. Defendan mendakwa telah melaksanakan obligasi di bawah kontrak dan dengan itu layak untuk menerima jumlah bayaran yang tercatat di dalam invois. Oleh kerana plaintif telah gagal untuk membayar hutang yang belum dijelaskan, defendan telah mengeluarkan notis tuntutan di bawah s 218 Akta Syarikat 1965 terhadap plaintif. Plaintif memfailkan permohonan mendapatkan injunksi untuk menghalang defendan daripada memfailkan petisyen penggulungan terhadap plaintif atas dasar bahawa hutang yang dituntut oleh defendan dipertikaikan dan ia adalah suatu penyalahgunaan proses mahkamah untuk menfailkan petisyen untuk mengulungkan plaintif berdasarkan hutang yang dipertikaikan. Adalah dihujahkan bahawa hutang tersebut adalah dipertikaikan atas dasar defendan tidak layak menerima bayaran selanjutnya kerana plaintif telah mempunyai tuntutan terhadap defendan kerana memecah kontrak di mana defendan bertanggungan untuk menanggung rugi dan jumlah yang perlu dibayar adalah melebihi jumlah yang perlu dibayar kepada defendan. Isu di hadapan mahkamah adalah sama ada hutang tersebut boleh dipertikaikan secara bona fide.

Diputuskan, mengenepikan permohonan:

(1) Hutang yang dituntut oleh defendan adalah berdasarkan invois-invois yang dikeluarkan dan dihantar kepada plaintif dan plaintif tidak menbangkitkan sebarang bantahan atau mempertikaikan invois yang dikeluarkan. Sebaliknya, plaintif meminta defendan mengirimkan perbezaan antara jumlah yang ditahan dengan jumlah di dalam invois. Ini adalah terjumlah kepada suatu pengakuan terhadap hutang tersebut. Oleh itu, pertikaian hutang oleh plaintif adalah tidak bona fide (lihat ms 517C, E–F).

(2) Tuntutan balas yang dibawa oleh plaintif tidak bermaksud bahawa defendan, yang juga seorang pempetisyen, akan gagal dalam petisyennya untuk menggulungkan plaintif. Mahkamah akan membuat keputusan semasa perbicaraan petsiyen tersebut sama ada untuk melaksanakan budi bicaranya dengan memihak kepada defendan. Oleh itu, tiada justifikasi bagi mahkamah untuk memberikan injunksi oleh kerana hutang tersebut tidak dipertikaikan dengan benar (lihat ms 518F–G).]

Notes

For cases on injunction generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1927–2353.

Cases referred to

Anglican Sales Ltd v South Pacific Manufacturing Co Ltd [1984] 2 NZLR 249 (refd)

A *Cadis Waterworks Co v Barnett* 44 LJ Ch 599 (refd)
Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd [1986] 2 MLJ 374 (refd)

Legislation referred to

B Companies Act 1965 s 218

Rueben Mathiavaranam (*Azman, Davidson & Co*) for the plaintif.
Romesh Roy (*WY Chan & Roy*) for the defendant.

Ariffin Jaka J: The plaintiff was awarded subcontract works by Taylor
C Woodrow Projects (M) Sdn Bhd pursuant to a letter dated 8 May 1986. The works were in relation to Star Light Rail Transit System 1 - Phase II Work Package TWP 02-33-20 Mulia Viaduct, Bifurcation Viaduct and East-West Link Crossing Structural Steelwork Fabrication and Erection. The subcontract works was for a lump sum of RM10,834,534.
D To carry out some of the works the plaintiff engaged the defendant as its subcontractor pursuant to a contract ('the contract') as evidenced by a letter dated 15 January 1997. The works which were awarded to the defendant under the contract were for the blasting and painting works of the steel bridges. As regards payment it was agreed that progress claim for payment will be paid within 30 days after month ending receipt of
E invoice. It was also agreed that in case of dispute Victor Buyck conditions of contract would apply.

It is the defendants's case that it has performed its obligations under the contract by carrying out the works and therefore it is entitled to payment of the sum stated in the invoices. As the plaintiff had failed to honour its obligations to meet the payment due to the defendant under
F the invoices the defendant caused to be issued a notice of demand dated 24 July 1997 under s 218 of the Companies Act 1965 against the plaintiff. The notice was served on the plaintiff. By this notice the defendant demanded for payment of the sum of RM398,785.74 being the total amount outstanding under the various invoices as per details
G following:

Invoice	Amount	Due Date
PI/P-0805	RM148,303,73 (balance)	30.4.97
H PI/P-0831	RM162,389.47	30.5.97
PI/P-0864	RM74,042.54	30.6.97
PI/P-0768	RM 3,250	30.3.97
I PI/P-0806	RM 2,800	30.4.97
PI/P-0830	RM 8,000	30.5.97

The plaintiff disputes the claim and says that a winding up petition should not be filed. By this originating summon filed on 20 August 1997, the plaintiff is seeking for an injunction to restraint the defendant either by itself or through its agents or employees or representatives from filing, prosecuting, delivering and/or advertising a winding up petition for the winding up of the plaintiff. On the same day the plaintiff also filed an ex parte summons-in-chambers (encl 3) seeking for the same order as prayed in the originating summons. I heard the application on 22 August 1997, on a certificate of urgency and granted the injunction sought for. As the injunction was obtained exparte it is effective only for two weeks and this prompted the plaintiff to file another summons in chambers (encl 6) on the same day ie on 22 August to be heard interpartes. The plaintiff is seeking for a similar injunction as the one granted ex parte to restraint the defendant until the hearing and conclusion of this action or any subsequent order. Enclosure 6 was fixed for hearing on 4 September 1997 but was postponed with the consent of both parties to 5 November 1997 to enable the defendant to file an affidavit in reply. On 5 November 1997, I dismissed the application. I now give my reasons.

The grounds for the plaintiff's application are stated in a lenghty affidavit in support affirmed by its director Wim Hoekman. In short the grounds are the debt claimed by the defendant is disputed and it is an abuse of the process of the court to file a petition to wind up the plaintiff based on a disputed debt. The debt is disputed on the grounds that the defendant is not entitled to further payment as the plaintiff has a claim against the defendant for breach of contract and the plaintiff has sufferred losses, costs, expense and damage which the defendant is liable to indemnify and the amount payable far exceeds the amount payable to the defendant.

It is established law that the court has a discretion in an application for injunction to restraint a person claiming to be a creditor of a company from presenting a petition to wind up the company. The court will exercise this discretion where the debt is bona fide disputed and the company is solvent (see *Cadis Waterworks Co v Barnett* 44 LJ Ch 599). In *Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd* [1986] 2 MLJ 374 it was held that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company.

The question to be decided in the instant application is therefore whether the debt as claimed by the defendant in the notice of demand against the plaintiff is bona fide disputed. The learned counsel for the plaintiff submitted that the debt is disputed. He pointed out that the claim in the notice of demand is for the sum of RM398,785.74. He submitted this amount is not correct and contended that the correct amount is as stated in Invoice No. PI/P 0805 dated 26 March 1997 (see exh WH9 p 224 in encl 2) which is the sum of RM205,851.93. Learned counsel further submitted that a payment in the sum of RM90,000 was made by the plaintiff thus leaving a balance of RM115,851.93.

On close scrutiny of this invoice I find that the contention of the learned counsel is preposterous and is incorrect. The invoice referred to by the

learned counsel is the invoice for the third progress claim under the terms of the contract. It should be remembered that the debt claimed by the defendant is based on the many invoices issued and sent to the plaintiff as stated earlier in this judgment which is the sum of RM398,785.74. It is explained by the defendant in the affidavit of Lim Hock Seong, a director of the defendant that this amount is the amount due to the defendant after taking into account all payments made by the plaintiff. The plaintiff had paid RM203,736.13 by TT on 12 April 1997 and RM90,000 also by TT on 30 May, 1997. These payments were credited by the defendant as payment for the first and second progress claims vide Invoice Nos PI/P-0758 dated 4 February 1997, PI/P-0767 dated 25 February 1997 and part payment of the third progress claim dated 26 March 1997. It is admitted by the plaintiff that no further payment were made in respect of the other invoices issued and sent to the defendant. Can it be said that under these circumstances the debt claimed by the defendant is bona fide disputed by the plaintiff? The learned counsel for the defendant submitted that there is no bona fide dispute of the debt. He also submitted that the plaintiff did not raise any objection on or disputed the invoices issued and sent to the plaintiff by the defendant. He pointed out that the plaintiff by its letter dated 11 July 1997 informed the defendant that a sum of RM715,463.04 being the liquidated damages due for late handover of the bridges payable by the plaintiff under the terms of the principal contract is witheld by Taylor Woodraw Project (M) Sdn Bhd from payment due to the plaintiff. The plaintiff is claiming this amount from the defendant. In the same letter the plaintiff requested the defendant to remit the sum of RM316,677.30 being the difference between the amount witheld and the amount invoiced by the defendant that is the sum of RM398,785.74. The learned counsel submitted that the request by the plaintiff is tantamount to an admission of the debt and the plaintiff is estopped from denying the debt. I agree with the learned counsel for the reasons stated by him that the dispute of the debt by the plaintiff is not bona fide and in fact it had admitted the debt by requesting to remit the difference between the amount witheld and the amount claimed by the defendant.

It was also contended by the learned counsel for the plaintiff that the plaintiff has rightly refused to make further payment to the defendant as the plaintiff has a claim against the defendant estimated at RM2,165,190 being the loss, costs expenses and damages for breach of the terms and warranties in the plaintiff's condition of contract ('the plaintiff's contract'). The plaintiff has a claim against the defendant and also the right of set off. Under these circumstances it was contended that it is an abuse of the process of the court for the defendant to file the petition against the plaintiff when there is a counterclaim. The question that arises is whether a counterclaim advanced by the debtor in an attempt to restraint the creditor from filing a winding up petition against the debtor could be said to create a bona fide dispute over the existence of the debt on which the winding up petition is founded.

In *Anglican Sales Ltd v South Pacific Manufacturing Co Ltd* [1984] 2 NZLR 249, the New Zealand Court of Appeal dealt with the issue of

a counterclaim advanced by the debtor in its application for an injunction to stay a winding up petition filed against it by the creditor. The appellant debtor did not dispute the debt. What it claimed is that the debtor had a counterclaim which equalled or exceeded the amount of its indebtedness to the creditor and that it was therefore an abuse of the process of the court to proceed with the petition. The court revoked the injunction granted by the judge in the lower court and held that where a debtor, while admitting the debt, advances a counterclaim in attempted answer to a petition, the petition should proceed to a determination with the court retaining a discretion as to whether it ultimately makes a winding up order. On the issue of the discretion of the court Greig J at p 71 has this to say:

> There is a clear distinction between the exercise of the discretion on hearing the petition and the exercise of the inherent discretion to restrain or stay the presentation of or further proceedings on a petition. What the appellant invokes in this case is the latter to stay proceedings as vexatious or an abuse of the process of the court's process. That is a general inherent jurisdiction which is exercisable in appropriate cases in any proceedings, including a petition for winding up brought under the Companies Act. It is a jurisdiction which is to be exercised with great circumspection. The test is whether it is impossible for the party concerned; in this case the petitioner to succeed in its claim.

Further at p 752 the learned judge held:

> This is not a case in which the petitioner's debt is disputed or in which it can be said that the petition must fail. The respondent is a creditor in what is conceeded to be a substantial amount. The appellant has a crossclaim sounding in unliquidated damages. That may leave in doubt as to whether the respondent on the hearing of the petition will necessarily succeed but it cannot be predicted now that the petition is bound to fail. The petitioner, the respondent in this case, ought to be entitled to prosecute its petition.

In the instant case I had ruled that the defendant is a creditor. Consequently, on the principle enunciated in the *Anglican Sales Ltd* case I am of the view that the counterclaim advanced by the plaintiff does not mean that the defendant, who is the petitioner, is bound to fail in its petition to wind up the plaintiff. The court will decide at the hearing of the petition whether to exercise its discretion in favour of the defendant. It follows, therefore that there is no justification for this court to grant the injunction as the debt is not genuinely disputed.

The learned counsel for the plaintiff also raised the question of arbitration. He contended that any dispute arising under or in connection with the condition in the plaintiff's contract should be referred to arbitration. This to my mind does not arise in view of my finding that the plaintiffs had admitted the debt and there is therefore no dispute which ought to be referred to arbitration.

In conclusion it is summarized that the plaintiff is not denying the debt. Prima facie the defendant is a creditor and as such it has a statutory right to file the petition for winding up under s 218 of the Companies Act 1965. The defendant's right to file the petition is not displaced merely on the ground

A that the plaintiff has a counterclaim against the defendant. It follows therefore that the defendant can proceed to file the petition. The court will then decide at the hearing of the petition and exercise its discretion whether the plaintiff should be wound up. For these reasons I have no alternative but to dismiss the plaintiff's application with costs.

B *Application dismissed.*

Reported by Jafisah Jaafar

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